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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL CABRERA,

Defendant and Appellant.

H023041

(Monterey County  
Super.Ct.Nos. CR 14984  
& CR 15121)

Defendant Manuel Cabrera appeals from the trial court's refusal to vacate his guilty pleas. Defendant's appeal rests on his claim that the trial court did not properly advise him of the immigration consequences of his guilty pleas.

For the reasons set forth below, we will affirm the judgment of conviction.

**FACTS AND PROCEDURAL HISTORY**

In 1989, defendant was charged in two separate cases with lewd and lascivious conduct on a minor under fourteen years of age. (Pen. Code, § 288, subd. (a).)<sup>1</sup> The first case involved defendant's stepdaughter. (Monterey County Superior Court number CR 14693, later refiled as case number CR 14984.) The second case involved defendant's natural daughter. (Monterey County Superior Court number CR 15121.)

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise specified.

Eventually, defendant pleaded guilty in both cases.

**Proceedings in Case Number CR 14984**

Defendant first pleaded guilty to the charge involving his stepdaughter in July 1989. At that time, he was advised that the offense could result in deportation if he was not a citizen.

Defendant was permitted to withdraw that plea in September 1989, apparently for reasons unrelated to immigration consequences.

In early December 1989, defendant again pleaded guilty to a single count of lewd and lascivious conduct with his stepdaughter. The court did not advise defendant of the immigration consequences of his plea at that time. Shortly thereafter, the trial court apparently denied defendant's request to again withdraw the guilty plea: the minute order for December 8, 1989 includes the notation that "the plea of guilty will stand."

On January 4, 1990, the court sentenced defendant to the upper term of eight years in prison and dismissed seven additional charges against defendant involving his stepdaughter.

**Proceedings in Case Number CR 15121**

In addition to the charges involving his stepdaughter, defendant was charged separately with lewd and lascivious conduct against his natural daughter. (§ 288, subd. (a).) The criminal complaint asserting this charge was filed in November 1989, followed in early December by the filing of an information. Defendant initially pleaded not guilty to the charge involving his daughter.

Shortly thereafter, on December 29, 1989, defendant withdrew his earlier plea of not guilty and entered a plea of guilty to the charge involving his daughter. The court did not mention immigration consequences at the time it took his plea.

Sentencing was scheduled for January 25, 1990. At that hearing, defendant claimed that he was not guilty and that he had never admitted guilt. The court

nevertheless refused to permit defendant to withdraw his plea. The court then sentenced defendant to the upper term of eight years, but suspended all but two years of the consecutive sentence.

Defendant appealed the judgment in CR 15121. The ground for defendant's appeal was his claim of ineffective assistance of counsel in connection with his attempt to withdraw his guilty plea at the sentencing hearing.

In October 1990, this court issued an opinion in which we set aside the judgment of conviction against defendant for the limited purpose of permitting him to file a motion to withdraw his guilty plea. We also ordered the judgment reinstated if defendant failed to timely make such a motion or if the trial court denied it.

Defendant apparently did move to withdraw his plea thereafter, and a hearing on that motion was conducted in March 1991. At the hearing, however, defendant withdrew his plea-withdrawal motion. At the conclusion of the hearing, defendant was remanded to the custody of the Sheriff for return to state prison.

### **Deportation**

As a result of the two convictions, the United States Immigration and Naturalization Service (INS) first initiated deportation proceedings against defendant in May 1990.

Following his release from prison, defendant was deported. In 1996, defendant illegally reentered this country. That led to defendant's return to state prison from November 1996 to February 1997. It also resulted in the filing of federal criminal charges against defendant in February 1997.

### **Motion to Withdraw Guilty Pleas**

On November 6, 1997, defendant moved to vacate both of his guilty pleas on the ground that the trial court had not advised him of the potential adverse immigration consequences of his convictions. (§ 1016.5.) The motion was

“dropped” on November 25, 1997, but defendant refiled it on January 20, 1998. The trial court denied the motion on February 19, 1998. Defendant filed a notice of appeal, but the period for filing had already elapsed and the appellate case was closed as “inoperative.”

On February 7, 2001, defendant moved for reconsideration of the denial of his statutory motion to vacate, claiming entitlement to relief under *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183 (*Zamudio*). The court conducted a hearing on defendant’s motion for reconsideration on February 23, 2001. Following the hearing, the court took the matter under submission, issuing its decision in April 2001. In its written decision, the court reconsidered its 1998 ruling in light of *Zamudio*, but ultimately denied defendant the relief he sought. The court concluded that defendant had “failed to establish that he was ignorant of the possible deportation consequences of his pleas.” The court also found that defendant had not shown prejudice.

This appeal ensued.

## **DISCUSSION**

### **Defendant’s Contention**

On appeal, defendant challenges the denial of his statutory motion to vacate the judgment of conviction. The basis for defendant’s appeal is his contention that the trial court committed reversible error by failing to advise him of the potential adverse immigration consequences of his guilty pleas, as required by section 1016.5.

### **Appealability**

Before addressing the merits of defendant’s contention, we first consider a threshold issue: appealability. The People raised the question of appealability by moving this court for an order dismissing defendant’s appeal. The People’s motion was made on the ground that defendant’s appeal was taken from a

nonappealable order. Defendant opposed the motion. We deferred determination of the People's motion to dismiss, in order to consider it with the appeal. We consider the issue now.

In urging dismissal of defendant's appeal, the People assert that the denial of a motion to vacate a judgment of conviction is not an appealable order. The California Supreme Court squarely rejected that assertion in a recent decision, however. (See, *People v. Totari* (2002) 28 Cal.4th 876, [*Totari*].) In *Totari*, the narrow issue before the high court was "whether the trial court's denial of defendant's statutory motion to vacate the judgment is an appealable order." (*Id.* at p. 879.) The Supreme Court concluded the "defendant may appeal from the trial court's denial of his section 1016.5 motion to vacate." (*Id.* at p. 879.)

In accordance with the views expressed in *Totari*, we deny the People's motion to dismiss and we consider defendant's appeal on its merits.

### **Standard of Review**

We review the trial court's ruling on the statutory motion to vacate for an abuse of discretion. (*Zamudio, supra*, 23 Cal.4th at p. 192.)

### **The Statute**

Section 1016.5 requires the trial court to advise criminal defendants of potential immigration consequences they face as a result of entering guilty pleas if they are not citizens. The statute provides: "Prior to acceptance of a plea of guilty or nolo contendere [no contest] to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (§ 1016.5, subd. (a).)

“The statute also specifies a remedy for a trial court’s failure to administer the mandated advisements. ‘If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.’ (§ 1016.5, subd. (b).)” (*Zamudio, supra*, 23 Cal.4th at p. 191.)

### **Entitlement to Relief**

“To prevail on a motion to vacate under section 1016.5, a defendant must establish that: (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement.” (*Totari, supra*, 28 Cal.4th at p. 884, citing *Zamudio, supra*, 23 Cal.4th at pp. 192, 199-200, and *People v. Dubon* (2001) 90 Cal.App.4th 944, 951-952.)

In this case, the People acknowledge that defendant faces adverse immigration consequences as a result of his pleas. Defendant’s entitlement to relief in this case thus turns on the other two prongs of the test: lack of proper advisement and prejudice. Defendant claims he established both elements. As we explain below, we disagree.

### **Statutory Advisement**

Defendant asserts that the trial court failed to give him the required statutory advisement. Defendant acknowledges, however, that the court did alert

him to the potential of deportation in an earlier, related action. (Monterey County Superior Court number CR 14693, later refiled as case number CR 14984.)

When defendant first pleaded guilty to molestation of his stepdaughter in July 1989, the trial court gave this advisement: “I don’t know whether or not you do or do not have any difficulties with the immigration authorities or whether you’re a citizen, but this type of a felony offense could also result in your deportation if there is any difficulty or immigration problems.” Defendant was permitted to withdraw that plea in September 1989, apparently for reasons unrelated to immigration consequences. In early December 1989, defendant again pleaded guilty to the same charges involving his stepdaughter. Several weeks after that, he pleaded guilty to molesting his daughter. Thus, the two guilty pleas at issue here were entered less than six months after defendant was warned of possible deportation in a related case. (Cf., e.g., *People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1620 [defendant aware of immigration consequences because of an earlier case].)

Defendant nevertheless contends that the July 1989 advisement was inadequate. He points out that the court warned him only about deportation, and failed to mention the other two potential consequences listed in the statute: denial of naturalization and exclusion from this country. Defendant argues that such an advisement is inadequate under *Zamudio*.

We do not read *Zamudio* so broadly. In that case, the trial court advised the defendant about deportation and naturalization but failed to warn him about possible exclusion from the United States. (*Zamudio, supra*, 23 Cal.4th at p. 191.) However, in discussing that issue for the trial court’s guidance on remand, the Supreme Court did not suggest that the incomplete advisement was inadequate as a matter of law. To the contrary, the Supreme Court said this: “Nevertheless, if defendant’s circumstances at the time of his 1992 plea did not, in fact, allow for

the possibility of his subsequent exclusion from the United States in the event he were deported, the advisements he received concerning deportation and naturalization would have been in substantial compliance with the requirements of section 1016.5, in that they would have informed defendant of the only consequences pertinent to his situation. Because the record does not disclose whether defendant would have been eligible for readmission, we are unable to conclude that the trial court erred in failing to deny defendant's motion on grounds of substantial compliance." (*Id.* at p. 208.)

Thus, in *Zamudio*, the Supreme Court left open the possibility that an advisement – though incomplete – nevertheless might constitute substantial compliance with the statute, depending on the particular defendant's circumstances. In this case, the trial court's advisement clearly was incomplete. Of the three potential immigration consequences identified in the statute, it addressed only one: deportation.

Despite its incompleteness, we conclude that the advisement given here substantially complied with section 1016.5, given the circumstances. In the first place, in his declaration in support of his motion to withdraw his plea, defendant himself identified deportation as the consequence he most particularly wished to avoid. This is hardly surprising; for many non-citizens, deportation is the most drastic consequence arising from a guilty plea. (See, e.g., *In re Resendiz* (2001) 25 Cal.4th 230, 250-251.) Here, defendant was specifically advised about deportation, albeit in an earlier hearing. Defendant now cites the court's failure to warn him about possible exclusion as a ground for relief. But defendant points us to no evidence in the record demonstrating that he faces that particular consequence. Thus, for all that appears in the record before us, the trial court's warning, which addressed only deportation, operated as an advisement of the only

immigration consequence pertinent to defendant's situation: deportation. (See, *Zamudio*, *supra*, 23 Cal.4th at p. 208.)

In sum, we conclude that the advisement given defendant here, though technically incomplete and given in an earlier, related case, substantially complied with the statute and that it was adequate under the circumstances of this case. Defendant has not carried his burden of demonstrating otherwise. (See, *Zamudio*, *supra*, 23 Cal.4th at p. 192.)

Furthermore, even if we agreed with defendant's contention that the immigration advisement in this case was inadequate, we nevertheless would affirm the denial of his statutory motion because, in our opinion, he has failed to demonstrate prejudice.

### **Prejudice**

"On the question of prejudice, defendant must show that it is reasonably probable he would not have pleaded guilty or nolo contendere if properly advised." (*Totari*, *supra*, 28 Cal.4th at p. 878, citing *Zamudio*, *supra*, 23 Cal.4th at pp. 209-210.)

A number of factors bear on the question of prejudice.

One such factor is the defendant's knowledge. "Whether defendant knew of the potential immigration consequences, despite inadequate advisements at the time of the plea, may be a significant factor in determining prejudice . . . ." (*Totari*, *supra*, 28 Cal.4th at p. 878, citing *Zamudio*, *supra*, 23 Cal.4th at pp. 199, 207, 209-210. See also, e.g., *People v. Murillo* (1995) 39 Cal.App.4th 1298, 1305-1306.) Here, even assuming that the advisement given in July 1989 was inadequate, it is evidence of defendant's knowledge that deportation was a possible consequence of his plea.

Another factor is the probable outcome of the case had defendant not entered the pleas he seeks to withdraw. (Cf., *In re Resendiz*, *supra*, 25 Cal.4th at

pp. 253-254 [claim of ineffective assistance of counsel in failing to advise of immigration consequences].) Here, defendant asserts that “the uncontradicted evidence shows that had [he] realized that his pleas would result in banishment from the United States, he would almost certainly have argued for a better deal or taken his chances at trial.” The “uncontradicted evidence” on which defendant relies is his own declaration, which states: “I would have fought the charges or disposed of them in a manner which would not have threatened my immigration status in the United States.” We are not persuaded by that evidence. We find no objective evidence on this record to corroborate defendant’s assertion that he would not have entered the pleas had he received an adequate statutory advisement. Corroboration of such claims is required. (Cf., *id.* at p. 253 [ineffective assistance claim].) As to defendant’s claim that he would have sought a better plea bargain, defendant has not “adduced any substantial evidence suggesting the prosecutor might ultimately have agreed to a plea that would have allowed [him] to avoid adverse immigration consequences.” (*Id.* at pp. 253-254.) Furthermore, in assessing whether defendant “would have insisted on proceeding to trial had he received competent advice, an appellate court also may consider the probable outcome of any trial, to the extent that may be discerned. [Citation.]” (*Id.* at p. 254.) Here, defendant’s trial attorney admitted that the evidence against defendant was “strong.” That evidence included the testimony of a doctor who examined one of the victims; it also included defendant’s own prior judicial admissions that he engaged in sexual intercourse with both victims. Nor does defendant suggest what defenses, if any, he might raise at trial. In short, this record discloses no reasonable probability that defendant would have enjoyed a favorable outcome had he “fought the charges” at trial. “The choice, moreover, that petitioner would have faced at the time he was considering whether to plead, even had he been properly advised, would not have been between, on the one

hand, pleading guilty and being deported and, on the other, going to trial and avoiding deportation. While it is true that by insisting on trial petitioner would for a period have retained a theoretical possibility of evading the conviction that rendered him deportable and excludable, it is equally true that a conviction following trial would have subjected him to the same immigration consequences.” (*Id.* at p. 254 [ineffective assistance claim].)

Accordingly, even if defendant had demonstrated that the trial court’s statutory advisement was deficient, he has failed to establish prejudice. We therefore conclude that the trial court did not err in denying defendant’s statutory motion to vacate the judgment of conviction based on his guilty pleas.

#### **DISPOSITION**

The judgment is affirmed.

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Wunderlich, J.

WE CONCUR:

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Premo, Acting P.J.

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Elia, J.